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OCTOBER TERM, 1996

RACHEL AGOSTINI, ET AL.,
Petitioners,

v.

BETTY-LOUISE FELTON, ET AL.,
Respondents.

CHANCELLOR OF THE BOARD OF EDUCATION, ET AL.,
Petitioners,

v.

BETTY-LOUISE FELTON, ET AL.,
Respondents.

BRIEF AMICUS CURIAE OF THE UNITED STATES CATHOLIC CONFERENCE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS

The United States Catholic Conference ("USCC") is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States. USCC advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity, the rights of parents and children, the sanctity of life, and the importance of religious communities. Values of particular importance to the Conference are the protection of the first amendment rights of religious organizations and their adherents, and the proper development of this Court's jurisprudence in that regard.

This case offers this Court an opportunity to speak on several important issues. First, the case allows for a serious reexamination of the Court's Establishment Clause jurisprudence which, both in substance and in process, has failed to serve the history and purpose of the first amendment. That jurisprudence can better serve the genuine goals of both religion clauses, and begin to implement them

more consistently. Second, and more importantly, this Court can meaningfully advance the welfare of special needs children by endorsing appropriate and religiously neutral ways to advance their education consistent with their parents' religious and cultural values.

Through their counsel, the parties have consented to the appearance of this amicus.

SUMMARY OF ARGUMENT

For the nineteen years prior to 1985, pursuant to Title I of the Elementary and Secondary Education Act and its successive amendments,[1] the New York City Board of Education provided remedial education to economically and educationally deprived children in both public and private schools, including religiously-affiliated schools. This remedial instruction was provided on premises, in both public and private schools. By all reckoning, that program was a success, serving to further the educational development of those children most in need.

The Court's decision in *Aguilar v. Felton*, 473 U.S. 402 (1985), dramatically altered that program. In perhaps the strictest application of "separation" principles, a bare majority in *Aguilar* decided that these remedial education programs could not constitutionally survive on the premises of religious schools in spite

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[1] On July 1, 1982, the Elementary and Secondary Education Act ("ESEA") of 1965 was amended and superseded by the Education Consolidation and Improvement Act ("ECIA") of 1981. Pub. L. No. 97-35, 95 Stat. 463, Title V, Subtitle D (1981). 20 U.S.C. § 3801 (1982). Chapter 1 of the ECIA incorporated by reference most provisions of Title I of the ESEA which were the subject of this lawsuit when filed in 1978 and includes identical provisions governing participation of private school students. *See* 20 U.S.C. § 3803 (1982). On October 20, 1994 Congress again amended ESEA, resulting in the redesignation of the program as "Title I." Pub. L. No. 103-382, 108 Stat. 3518, Title I (1994). 20 U.S.C. § 6301 (1994). We will refer to the program throughout as "Title I."

of the fact that not a single instance, in 19 years, of improper attempts to inculcate religious beliefs at public expense, was ever demonstrated. *Aguilar*, 473 U.S. at 424 (O'Connor, J., dissenting). Following *Aguilar*, school authorities were forced to pursue alternative venues and techniques to provide those services to children who needed and were entitled to them, and who attended parochial schools. These techniques themselves have come under attack as being constitutionally deficient, by groups and individuals opposed to the provision of special education services in any but a public school setting. *See, e.g., Committee for Public Education and Religious Liberty v. Secretary, U.S. Dept. of Education*, 942 F.Supp. 842 (E.D.N.Y. 1996). At the same time, the development of this Court's Religion Clauses jurisprudence has grown away from *Aguilar*, and has made its deficiencies, with its singular reliance on *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), all the more clear. This Court should embark in a new direction, abandoning the flawed decision in *Aguilar* and the aptly-labeled *Lemon* test. This Court should do so in a way that sets out new parameters the Court can use to frame a more appropriate test, rooted in history and experience but capable of application to a range of contemporary problems.

First, such a test must provide for absolute impartiality of treatment for religion, and among religions. In order to do so, two interests must both be served, rather than spuriously seeming to be weighed against each other. Personal religious liberty must at all times be protected from encroachment by the state, and the institutional autonomy of both governmental and religious institutions must not be impinged upon. Neither must be permitted to intrude into the institutional prerogatives of the other.

Second, these interests should be protected by demanding that the challenger of the action in question, as in all other civil litigation, bear the burden of demonstrating that a claimed violation of the Establishment Clause has in fact occurred. In *Aguilar*, the burden was essentially placed on those defending the program to prove that public employees could never convey a religious message in delivering Title I services, without constant surveillance arising out of the state's efforts to supervise its own employees who were providing these services. *Aguilar*, 473 U.S. at 413. That supervision,

in and of itself, was seen in *Aguilar* as violative of *Lemon*'s entanglement test.

The state's affirmative obligation to accommodate religion, not take a position hostile to religious belief itself, must be clearly recognized. By using these standards as a benchmark, then, the Establishment Clause can here be understood in a coherent way. Applying these standards here will not only result in the reversal of *Aguilar* but set a course for future jurisprudence that allows for the vindication of the authentic goals of both Religion Clauses.

ARGUMENT

I. *Aguilar v. Felton* Has Institutionalized Significant Jurisprudential and Educational Deficiencies.

This Court has a chance to undo a decision that has been as damaging in its implications for religious/state relationships in this country, as it has been damaging to the educational interests of the economically needy and educationally disadvantaged students whose parents have chosen to send them to religiously affiliated schools. In *Aguilar*, this Court decided that the Establishment Clause prohibited the provision of Title I remedial educational services to children entitled to receive these services, on the premises of their own schools, if those schools happened to be religiously affiliated. In large part it did so because it concluded that a violation of the "entanglement prong" of the *Lemon* test would "inevitably result" from the public school board's monitoring of its *own* teachers, who were providing services on the premises of parochial schools. *Aguilar*, 473 U.S. at 409. In the intervening years, both the jurisprudential and educational goals of the country have suffered. Here, the Court can -- and we submit, must -- make things right.

A. *Aguilar* Is Inextricably Rooted in *Lemon*, and Its Suspect Interpretation of Constitutional Text and Principle.

It is clear from this Court's decision in *Aguilar* that that decision depends, first and last, on the authority of the tripartite test

announced in *Lemon v. Kurtzman*. Application of the three-part *Lemon* test resulted in the Court's decision that the state's own supervision of its own publicly-employed special education teachers conducting remedial education in religious schools constituted "excessive entanglement" of church and state. *Aguilar*, 473 U.S. at 409. *Lemon* does not do legitimate service to the constitutional text. It skews the analysis against beneficial and constitutional cooperation between government and religion, as measured by history and experience. *Aguilar* should be overturned because it depends on *Lemon*, and the test enunciated in *Lemon* should be reconsidered and reformulated along the lines suggested here. The factual circumstances of *Aguilar* presented no threat at all of establishment or preference of any particular religion. Rather, the *Aguilar* decision demonstrates affirmative "hostility toward religion and the children who attend church-sponsored schools." *Aguilar*, 473 U.S. at 420 (Burger, C.J., dissenting).

Lemon itself has long been subject to criticism as excessive and unsupportable.[2] Many members of this Court have joined in this criticism. From the time *Lemon* was decided, in fact, members of the Court have criticized the test as not being a particularly useful or principled way of deciding cases. *Lemon*, 403 U.S. at 668 (White, J., concurring in part, dissenting in part). In *Wallace v. Jaffree*, 472 U.S. 38 (1985), Chief Justice Rehnquist wrote that "[these] difficulties arise because the *Lemon* test has no more grounding in the history of the First Amendment than does the ["]wall["] theory upon which it rests. . . .The three-part test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize. Even worse, the *Lemon* test has caused this

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[2] *Lemon* has come under broad-ranging criticism in the academic legal community, and for a variety of reasons. *See, e.g.*, Michael Stokes Paulsen, *Lemon is Dead*, 43 Case W. Res. L. Rev. 795 (1993); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 127-34 (1992); Mark E. Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 Geo. Wash. L. Rev. 645, 654-60 (1992); Mary Ann Glendon & Raul Yanes, *Structural Free Exercise*, 90 Mich. L. Rev. 477, 503, 538 (1991).

Court to fracture into unworkable plurality opinions. . . ." *Id.* at 110 (dissenting). Justice Kennedy has indicated that an overall revision of the Court's Establishment Clause jurisprudence "may be in order." *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 656 (1989) (concurring in part and dissenting in part). Justice O'Connor has pointed out the particular problems which application of the *Lemon* test creates, when the issue is what steps the government can take to accommodate the exercise of religion without at the same time violating the Establishment Clause. *Corporation of Presiding Bishops of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 346 (1987) (concurring in judgment), as well as criticizing the *Lemon* test as being, in and of itself, excessively rigid and insensitive to the demands of constitutional litigation. *Board of Education of Kiryas Joel Village School District v. Grumet*, 114 S.Ct. 2481, 2500 (1994) (concurring and concurring in judgment). Justice Scalia has also criticized the *Lemon* test. *See Edwards v. Aguillard*, 482 U.S. 578, 613-19 (1987). Justice Souter has voiced his concern that the *Lemon* test, as applied, may be in direct conflict with the Free Exercise Clause. Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings Before The Senate Comm. on the Judiciary, 101st Cong., 2d Sess. 156 (1990) (statement of nominee). In his opinion for the Court in *Kiryas Joel*, 114 S.Ct. at 2487-2494, Justice Souter eschewed *Lemon* in favor of an analysis of the facts and circumstances of the case.

Lemon has led to results in individual cases, particularly in the area of education, that are inconsistent and conflicting. *Wallace*, 472 U.S. at 110-11 (Rehnquist, J., dissenting). The focus of this brief, however, is not only on achieving a different result in the instant case, but also upon the process this Court utilizes in scrutinizing challenges brought under the Establishment Clause. That Clause demands that the Court must have a means to distinguish "real threat" from "mere shadow." *Marsh v. Chambers*, 463 U.S. 783, 795 (1983) (quoting *School District of Abington Township v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)). Those means must also be rooted in what history and experience teach are the goals and values of the constitutional text. *See Lynch v. Donnelly*, 465 U.S. 668, 673-76 (1984). It is a text of enormous complexity requiring

care and sensitivity in its application.[3] *Lemon* has utterly failed to provide that procedural vehicle. It weights the scales of justice against legitimate and benign cooperation undertaken in the public interest. In *Aguilar*, it allowed the invalidation of an important public program without any evidence of actual harm.

Each prong of the *Lemon* test is problematic. On its face, the search for "secular purpose" seems uncontroversial. In many circumstances the Court simply looks to the goals sought to be achieved as stated by the legislature. But in religion cases, *Lemon* invites judges to do more, searching not just the legislature's motives but those of individual legislators as well.[4] The second, "primary effect," prong, clearly manifests a distrust of religious organizations to function properly within the confines of a governmental program. For example, in *Lemon* the Court concluded that the religious nature of the institution providing the services, by itself, demonstrated that the statute had the primary effect of aiding religion. *Lemon*, 403 U.S. at 635 (Douglas, J., concurring). The Court reasoned that all functions of a religious institution, whether a school or a social service agency, are committed to the inculcation of religious beliefs. By linking one function of a religious institution with all of its others, the Court assumed that religious organizations could not keep their

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[3] Acts of Congress should not be invalidated absent "clear incompatibility" with the Constitution. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 530-31 (1871).

[4] *See, e.g., Wallace*, 472 U.S. at 56-58 (hinging its conclusion on fact that legislature had no secular purpose, based on the views of the principal sponsors). For the most part, the Court has deferred to the legislative findings and purposes that are reflected in the statute. *See Pacific Gas and Elec. Co. v. Public Utils. Comm'n.*, 475 U.S. 1 (1986). The basic rule of statutory construction is to disregard views of individual legislators (even sponsors) as definitive interpretative guides. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 311-12 (1979); *see also United States v. Public Utils. Comm'n.*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring) (stating that the Court should avoid "psychoanalysis of Congress").

various missions and goals separate. *Id.*[5] That conclusion of constitutional significance has had disastrous consequences for the education of our nation's neediest children.

It has always been recognized that the third facet of the *Lemon* test, "excessive entanglement," is inherently "insolubly paradoxical." *Roemer v. Maryland Board of Public Works*, 426 U.S. 736, 768 (1976) (White, J., concurring in judgment). This "Catch-22" effectively creates a presumption of invalidity in cases having to do with governmental aid programs involving religious schools. *Aguilar*, 473 U.S. at 420 (Rehnquist, J., dissenting). This presumption, and the inversion of the usual burdens of proof in the civil case which was its concomitant in *Aguilar*, have also been roundly criticized. *See, e.g.*, Glendon and Yanes, *Structural Free Exercise*, 90 Mich. L. Rev. *supra at* 510-514. This presumption of invalidity arises from the way the *Lemon* test was enunciated. The test stated in *Lemon* was not limited to the actual issue presented there, the propriety of direct government supervision of officials of a religious institution. *Lemon*, 403 U.S. at 619-20. Rather, *Lemon* broadly condemned all "entanglement," whether merely administrative, substantive, or even entirely "prophylactic contacts" having no purpose whatsoever except to *ensure* that teachers were not teaching religious beliefs or doctrines when they were to be teaching government-funded secular material. *Lemon*, 403 U.S. at 619. By finding "entanglement" even though the Court agreed that only potential but not actual hazards had been shown, *id.* at 618, it virtually conclusively presumed that whenever a government aid

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[5] From time to time, this Court has employed the rubric "pervasively sectarian" to mean an institution in which religious proselytism and instruction could not be distinguished from secular education. That terminology itself shows a marked hostility towards religion and contributes to the jurisprudential problem underlying this case. Richard Baer, *The Supreme Court's Discriminatory Use of the Term "Sectarian,"* 6 J. Law & Politics 449 (1990). The focus should not be the institution but the program of cooperation, and how the institutional cooperation utilizes public funds. *Bowen v. Kendrick*, 487 U.S. 589, 624 (1988) (Scalia, J., concurring).

program involving parochial schools was at issue, that program would violate the Establishment Clause.[6]

All of these concerns, distilled by Justice O'Connor's recognition in *Aguilar* that the *Lemon* test had indeed condemned benign cooperation between church and state, *Aguilar*, 473 U.S. at 421 (O'Connor, J., dissenting), show that new parameters must be used to evaluate the constitutionality of governmental actions in cases that raise Religion Clauses issues.

B. *Aguilar* Has Created Significant and Expensive Difficulties, Harmful Both to Needy Children and the Common Good of Our Society.

The *Aguilar* decision was made in the face of proof in the District Court that the on-premises program had, in Justice O'Connor's words, "over almost two decades . . . . helped thousands of impoverished parochial school children to overcome educational disadvantages without once attempting to inculcate religion." *Aguilar*, 473 U.S. at 431 (O'Connor, J., dissenting). Concurring in the opinion in *Aguilar*, Justice Powell conceded that the educational programs in question there had "done so much good and little, if any,

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[6] Simply abandoning "excessive entanglement" is, however, not a solution. In *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court rewrote its Free Exercise Clause jurisprudence generally but attempted to leave intact its caselaw immunizing church internal operations, doctrine, and polity from secular court scrutiny. *Id.* at 876-78. Some of that caselaw involves decisions that involvement of a state regulator, for example, in a particular matter in a religious institution, would "excessively entangle" the state in the governance of a church. *See, e.g., NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501-7 (1979); *see also Schmidt v. Bishop*, 779 F.Supp. 321, 327-9 (S.D.N.Y. 1991). These cases are examples of "free exercise," not "establishment," concerns. But revision of the test, as suggested here, should avoid creating more harm to the body of law protective of religious institutions, a principle on which this Court has always correctly persisted.

detectable harm," echoing the Second Circuit's decision below in *Felton v. Secretary, U.S. Dept. of Education*, 739 F.2d 48, 72 (1984). *Aguilar*, 473 U.S. at 415. At the same time, the *Aguilar* decision led to extraordinary costs on the part of school districts nationwide as they attempted to comply with the decision and provide these services in ways not prohibited under *Aguilar*, as well as to much additional litigation attempting to fix its boundaries and its meaning.

Aguilar created major logistical and educational problems in delivering Title I services to private school children, resulting in fewer children receiving remedial services.[7] Following *Aguilar*, participation of private school children in the Title I program dropped precipitously as school districts scrambled to provide alternative methods to deliver those services. Before *Aguilar*, states served 185,000 private school students. After *Aguilar*, the number declined by 62,000 children.[8] In addition, the quality of those services also became inferior to those provided pre-*Aguilar* and to those provided to public school children. Alternative delivery systems have included mobile vans parked on public streets, portable classrooms on neutral sites, instruction in public school buildings, and computer-assisted instruction in private schools with no instructional personnel present.[9] Requiring students to leave their regular schools and travel

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[7] U.S. Department of Education, *Statement of the Independent Review Panel of the National Assessment of Chapter 1*, 57 (1993).

[8] General Accounting Office, *Aguilar v. Felton Decision's Continuing Impact on Chapter 1 Program*, 5 (GAO/HRD-89-131BR, 1989).

[9] A. Russo, M. Haslam, *The Uses of Computer Assisted Instruction in Chapter 1 Programs Serving Sectarian Private School Students*, 17, 57-58 (U.S. Dept. of Education, 1992). Computer assisted instruction also has its problems. It is not well integrated with regular school programs, frequently neglects staff training and support, and is used primarily for drill and practice in basic skills. *Id.* at iii. The contribution of computer assisted instruction to students' intellectual development and

to locations off-site interrupts the educational process, creates safety concerns, and causes undue hardship on children.

Most importantly, even for those children who continue to receive services, *Aguilar*'s continuing detrimental impact is that it exacerbates the educational deficiencies of the children most in need of help. Requiring services to be off-premises adds another layer of disruption to the school day, requiring children to travel to alternative education sites for their remedial instruction or receive less effective instructional techniques. This further disadvantages these children and further derogates the public interest in serving them. It is a disservice to the public interest to invalidate in-school programs which promote real educational, economic, and social values, and do not, except by arrant speculation, in any way establish religion.

Following *Aguilar*, Congress attempted to ameliorate the problems that *Aguilar* created. 20 U.S.C. § 2727(d).[10] Between 1988

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improved achievement is limited. *Id.* at 23.

[10] The Senate Labor and Human Resources Committee reported:

> To comply with the Supreme Court's decision [in *Aguilar v. Felton*], schools have had to implement costly, disruptive, and creative procedures to serve private school children.
>
> The Committee strongly believes that these eligible children should be served. Service to eligible private school children has been a provision in law since its enactment in 1965. The Committee is very concerned that efforts to comply with the Supreme Court ruling have resulted in a decline of about 35 percent in the number of private school children who are served.

S. Rep. No. 100-222, 100th Cong., 1st Sess. 14, *reprinted in*, 1988 U.S. Code Cong. & Ad. News 101, 114.

and 1993, Congress had appropriated over $180 million to help defray the cost of capital expenses associated with alternative delivery methods, such as mobile vans, and the leases of neutral sites necessitated by *Aguilar*,[11] money that could better have been used to provide instructional services to both public and private school students. Instead, the costs for alternative delivery methods decrease the amount of funds available to provide instructional services for all students, regardless of where they attend school.

What followed, predictably, was a spate of new litigation which focused on the use of government-controlled mobile vans being used for remedial education classrooms, other alternative teaching methods, and the methods of cost allocation. A Missouri district court invalidated both the parking of mobile vans on school property, and the method of accounting for any additional costs to provide these services. *Pulido v. Cavazos*, 728 F. Supp. 574 (W.D. Mo. 1989). The district court came to the conclusion that a van

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[11] M. Haslam, D. Humphrey, *Chapter 1 Services to Private Religious School Students*, 41 (U.S. Dept. of Education, 1993), (approximately $161 million had been appropriated for capital expenses for fiscal years 1988-93). Subsequently, Congress appropriated additional funds for capital expenses: $41.434 million for fiscal year 1994, Pub. L. 103-112, 107 Stat. 1082, 1101 (1993); $41. 434 million for fiscal year 1995, Pub. L. 103-333, 108 Stat. 2539, 2562 (1994); and $20 million for fiscal year 1996, Pub. L. 104-56, 109 Stat. 548 (1995). Perhaps appropriately, the extra costs required to provide remedial education to needy parochial school students as a result of this Court's decision in *Aguilar* have become known as "*Felton* costs." These "*Felton* costs' had to be taken "off-the-top" of a state's allocation of funds in order to provide actual services equitably to all needy students. If these costs were not taken off the top of the allocation of Title 1 funds, but instead were assessed against the private school students' share of Title 1 funds, services might have to be discontinued for a year or more. Many students would be unserved or would simply be forced to leave their private schools.

parked directly in front of a parochial school, just a few steps from the entrance, but outside the school's property line, was constitutional, while a van parked across campus, out of sight of the school's entrance, but on land owned by the school, violated the first amendment. *Id.* at 587-93. On appeal, the Eighth Circuit upheld both the use of mobile classrooms, no matter where parked, as well as the cost allocation method. *Pulido*, 934 F.2d 912 (8th Cir. 1991). By contrast, a Kentucky district court upheld the delivery of services in off-premises mobile vans but invalidated the method of cost allocation. *Barnes v. Cavazos*, No. C80-0501-L(A) (W.D. Ky. Feb. 21, 1990). The Sixth Circuit upheld the actual dollar allocation of costs, based solely on the facts in that case, but did not address the van placement issue. *Barnes*, 966 F.2d 1056 (6th Cir. 1992).

In yet another of *Aguilar*'s progeny, a district court concluded that property boundaries do have constitutional significance for placement of mobile vans. *Walker v. San Francisco Unified School District*, 761 F. Supp. 1463, 1469-71 (N.D. Cal. 1991). But the *Walker* court supported the constitutionality of the method of financing. *Id.* at 1472. On appeal, the Ninth Circuit in *Walker* held that the provision of Title I services in vans parked on parochial school premises did *not* violate the Establishment Clause, and neither did the monitoring of Title I teachers by their public-employee supervisors. *Walker v. San Francisco Unified School District*, 46 F.3d 1449 (1995). In *Board of Education v. Alexander*, 983 F.2d 743 (7th Cir. 1992), the Seventh Circuit resolved a similar challenge to the way in which so-called "*Felton*" costs were taken off the top of a total agency allotment under Title I, holding that that did not violate the Establishment Clause.

Clearly, the continuing litigation of these questions, arising as it does from *Aguilar*, has also had an adverse impact upon the overall Title I program. That, and the adverse educational consequences of off-premises teaching methods, reinforce the conclusion that *Aguilar* must be overturned and the *Lemon* test reformed.

II. A New Approach to the Interpretation of the Establishment Clause Must Be Undertaken Here.

This Court has regularly insisted upon history and experience as its only reliable guides in the interpretation and application of the Establishment Clause. *Lynch v. Donnelly*, 465 U.S. 668, 673-76 (1984). Unfortunately, consideration of the meaning of the Religion Clauses frequently begins and ends with reference to Thomas Jefferson's "wall of separation" between church and state.[12] "The concept of a 'wall' of separation is a useful figure of speech. . . [b]ut the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state." *Lynch*, 465 U.S. at 673. It is often forgotten that the Religion Clauses were themselves political compromises forged by persons of different cultural, religious and regional experiences. No one or another view predominated in fact. Even if Jefferson were the benchmark, Jefferson's view of religion and the state was one in which religion played a central role in the order of society. Although Jefferson opposed the establishment of any religion, he and other founders believed that the interaction of religion and state brought about and preserved moral values which were essential to civil government. Jefferson, like others of his contemporaries, believed that religion was important in the public and private lives of the citizens of the state.[13]

The history of the drafting and negotiations that led to the wording of the Religion Clauses as finally adopted by the First Congress is detailed in many texts. *See* Chester J. Antieu, *Freedom From Federal Establishment: Formation and Early History of the First Amendment Religion Clauses*, 187-8 (1964). The process of extensive compromise that resulted in the Establishment Clause–

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[12] *See McCollum v. Board of Education*, 333 U.S. 203, 244 n.8 (1948) (Reed, J., dissenting) (quoting 1802 Letter to Danbury Baptist Churches in 8 *The Writings of Thomas Jefferson* 113 (Washington ed., 1861)).

[13] PROCEEDINGS, EARL WARREN CONFERENCE ON ADVOCACY, CHURCH, STATE AND POLITICS 79 (1981).

shows that it had two specific purposes: first, to prevent Congress from establishing or favoring a *national* religion; and second, to prevent Congress from interfering with the *states'* policies with regard to religion.[14] The Framers of the Constitution, however, "had no fear or jealously of religion itself, nor did they wish to see us an irreligious people . . ." S. Rep. No. 376, 32d Cong. 2d Sess. 4 (1853) (appointment and compensation of legislative chaplains); *see also Zorach v. Clauson*, 343 U.S. 306, 312 (1952) ("The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State"). There was no concern expressed during the first congressional debates that the government might enact a law beneficial to religion or religious institutions. 1 ANNALS OF CONGRESS 730-31 (Gales & Seaton eds. 1789).

History indicates that the Establishment Clause was intended to prohibit the preference of one religion over another; it did not forbid any assistance, regulation, or other interaction. Clearly the Framers of the Religion Clauses in the First Congress allowed some state involvement with religion, including payment for chaplains, *Marsh v. Chambers*, 463 U.S. 783, 788 (1983), a Thanksgiving Holiday, *id.* at 788, and inclusion of churches in land grants in the Northwest Territories, *Wallace*, 472 U.S. at 100 (Rehnquist, J., dissenting). Benevolence toward religion was not perceived as an evil. Rather, support and encouragement of religion was perceived to be in the public good.

Into the sixteen simple words of text,[15] the First Congress

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[14] 1 ANNALS OF CONGRESS 730-31 (Gales & Seaton eds. 1789). At the time of the Constitutional Convention, there was a wide diversity of views and practices among the states regarding established religion. *See* 3 J. Elliot, DEBATES OF THE FEDERAL CONSTITUTION 330 (2d ed. 1836) (Madison's discussion of freedom of religion in Virginia).

[15] "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...." U.S. Const. amend. I.

subsumed centuries of contention about the appropriate relation between religion and government. The Religion Clauses reflect the experience of their Framers that an officially preferred or nationally established religion generates religious intolerance and infringes upon personal liberty. *See, e.g., Abington Township*, 374 U.S. at 228 (Douglas, J., concurring); *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961). The Establishment Clause was not meant to drive a wedge between church and state, but rather to avoid those relationships between the two which pose a realistic threat of impairing religious liberty. *See Lynch*, 465 U.S. at 683.

The Religion Clauses were included in the Bill of Rights:

> [N]ot as protection *from* religion, but rather as a protection *for* religion. They were inserted in our Constitution largely because its framers felt that they were important to ensure the continuance and the strengthening of religion which could not flourish under American conditions if any State Church were either provided for or tolerated.

1 A. Stokes, CHURCH AND STATE IN THE UNITED STATES, 556 (1950). While one of the signal purposes of the Religion Clauses is to protect personal religious liberty, it is equally plain that one of the political purposes of the Clauses was to preserve the integrity of religious and governmental institutions. *See Abington Township*, 374 U.S. at 222 (government neutrality toward religion prevents powerful sects from fusing governmental and religious functions, and protects the freedom of religious observance from state compulsion); *Everson v. Board of Education*, 330 U.S. 1, 15 (1947) (the federal government structure protects public and religious organizations from interfering with each other).

In her concurrence in *Lynch v. Donnelly*, Justice O'Connor's analysis of the Establishment Clause identified two evils that could

accompany the excessive involvement of religion in government and government in religion: (1) the loss of political and institutional autonomy; and (2) the loss of personal religious liberty. 465 U.S. at 687-88. The loss of institutional autonomy was not feared just for the consequences for personal religious liberty, but "equally feared because of its tendencies to political tyranny and subversion of civil authority." *McGowan v. Maryland*, 366 U.S. 420, 430 (1961). It is important, therefore, as one considers the interests served by church and state each to be independent and autonomous, that together they share important responsibilities with deep roots in our national tradition.

Both components of the Religion Clauses, then, were meant to work to the same end. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). If the Establishment Clause is read to reach results which cannot be justified in terms of religious liberty, it fails to serve the intended constitutional purpose. This is certainly the case when it is used to invalidate governmental accommodation of activities conducted by religious institutions which serve the public interest and which pose no actual threat to religious freedom. *Lemon*, and of necessity *Aguilar*, fail this test. They demand a scrutiny of a public program without regard to its real purposes and effects, unguided by constitutional tradition and unrestrained by any consideration of the common good.

A. A New Interpretational Guide Should Be Rooted in the History of the Religion Clauses and Capable of Consistent Application.

The Religion Clauses of the first amendment to the United States Constitution must be read consistently with the goals outlined above, as well as coherently in an internal sense. This is because, as Justice Goldburg put it in *Abington Township*, the two Religion Clauses "are to be read together, and in light of the single end which they are designed to serve. The basic purpose. . . is to promote and assure the fullest possible scope of religious liberty and tolerance for all. . . ." *Abington Township*, 374 U.S. at 305 (concurring). In order to do this, the Religion Clauses must be read with a view toward the goals that the first amendment was intended to achieve. By use of

this framework, first amendment jurisprudence can develop free from the spurious linguistic categories of "original" versus "contemporary" construction, as well as placing the Court's prior First Amendment cases in a useful context that reads the Free Exercise Clause and the Establishment Clause together.[16]

In *Lemon*, this Court attempted that goal by reading together the various strands of its jurisprudence. *Lemon*, 403 U.S. at 611-623. However, the test chosen was not adequate for it lacked roots in constitutional, as opposed to jurisprudential, precedent and, as indicated above, weighted the scales of justice against cooperation in the public interest. This Court has often said that the Constitution forbids "sponsorship, financial support, and the active involvement of the sovereign in religious activity," *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970), but has not been able to provide a means for drawing these fine distinctions. Dissatisfied with *Lemon*, members of this Court have struggled with whether *Lemon*, or a different test or tests, shall apply.[17] The result has been a lack of coherence in

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[16] Mark E. Chopko, *Intentional Values and the Public Interest - A Plea for Consistency in Church/State Relations*, 39 DePaul L. Rev. 1143, 1163 (1990). In this way, the approach attempts to link this Court's insistence that history be its guide with the reality that contemporary society, incorporation under the Fourteenth Amendment, and new problems require flexibility. Rigid and narrow use of text and history limits the usefulness of a test that is blind towards these realities. Ignorance of history means that a test lacks roots in the very text it purports to interpret. "Intentional values" is a way to bridge these two concerns.

[17] Compare *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141, 2148 & n.7 (1993), *with Zobrest v. Catalina Foothills School District*, 113 S.Ct. 2462, 2464-69 (1993) (resolution of claim in *Lamb's Chapel* relies on *Lemon*; seven days later, *Zobrest* decided without it). *See also Lynch v. Donnelly*, 465 U.S. at 688 (O'Connor, J., concurring) (endorsement test); *County of Allegheny v. ACLU*, 492 U.S. at 655, 660-61 (Kennedy, J.) (coercion test); *Capital Square v. Pinette*, 115 S.Ct. 2440, 2452 (1995) (O'Connor, J., concurring) (different

process even while there has been a substantial shift favoring programs that are neutral towards religion.

In *Zobrest v. Catalina Foothills School District*, 113 S.Ct. 2462 (1993), this Court found that a public school district's payment for a sign language interpreter for a hearing-impaired parochial school student, on the parochial school's premises, did not violate the Establishment Clause. The Court held that the interpreter could be provided on premises because that "is part of a general government program that distributes benefits neutrally" to those who qualify, even if the religious school involved may tangentially benefit." *Id.* at 2467. Three years later, in *Rosenberger v. Rector of the University of Virginia*, 115 S.Ct. 2510, 2521 (1996), the Court pointed to what it termed a "central lesson" of its Establishment Clause decisions, "that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." That principle of neutrality, the Court said, would be served, rather than undermined, by taxpayer funding of a student religious newspaper, where funding was provided to the student religious organization on the same basis as it was to other student groups. *Id.* at 2521.

This vital principle of neutrality is in no way reflected in *Aguilar*. The program overturned in *Aguilar* provided benefits to school children without reference to religion. *Zobrest*, 113 S.Ct. at 2467-9. It did so following "neutral criteria and even-handed policies." *Rosenberger*, 115 S.Ct. at 2521. The 1985 *Aguilar* decision then, is an example, *not* of the Court enforcing a requirement of neutrality, but rather imposing a "quarantine[] from public benefits" which it rejected in *Roemer*, 426 U.S. at 746. An increased focus on genuine religious-neutrality has shifted the law back toward the authentic intentions of the First Amendment. A reliable test would not need to rely exclusively on facial neutrality but could be applied in more diverse contexts. The "neutrality" approach is but one piece of a more complex puzzle. "Neutrality" tests the level of involvement between religion and government, but the set of facts and circumstances to be evaluated in the range of cases presented is

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tests for various purposes).

far broader, and requires, in our view, a different analytical tool.

As a concomitant to the obligation of government not to interfere with the institutional operation of religion, and the obligation to ensure personal religious freedom, government also bears an affirmative obligation to accommodate religion and religious practice. This is true, first and foremost, because the Free Exercise Clause affirmatively commits the *government itself* to religious tolerance. *Church of Lukumi Babalu Aye v. City of Hialeah*, 113 S.Ct. 2217, 2234 (1993). This translates into a requirement of "benevolent neutrality," *Walz*, 397 U.S. at 669 (emphasis added), not a requirement to ignore religious needs, *Roemer*, 426 U.S. at 736; *Hunt v. McNair*, 413 U.S. 734 (1973). In *Kiryas Joel*, Justice Souter noted that "government may (and sometime must) accommodate religious practices and . . . may do so without violating the Establishment Clause." *Kiryas Joel*, 114 S.Ct. at 2492, quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987). The Establishment Clause simply does not require the automatic invalidation of every cooperative effort between religious and governmental entities. *Abington Township*, 374 U.S. at 294-96 (Brennan, J., concurring).

This is consistent with Congress' decision to enact the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, and with the rationales of *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). These manifest an underlying recognition of an obligation on the part of our government to accommodate its own practices and requirements to the religious needs of citizens. This is because accommodation of government to religious interests is important to a free society. *Zorach*, 343 U.S. at 313-14; *see Walz*, 397 U.S. at 689 (Brennan, J., concurring). Any Religion Clauses test that does not respect the need for governmental accommodation of religious beliefs and practices flies in the face of the Framers' intent, as well as the exigencies of a complex contemporary society.

B. This Court Should Insist That Cooperative Efforts Between Religious and Governmental Institutions Be Tested According to Whether It Can be Demonstrated That the Program Actually Impairs Personal Religious Liberty or Institutional Autonomy.

A new approach to the interpretation of the Establishment Clause must evaluate two intentional goals. First, personal religious liberty must be affirmatively protected and furthered by the state. So, the state cannot sponsor one particular religious activity, or support one to the detriment of others, or oppose any or all. Secondly and simultaneously, the institutional autonomy of both governmental and religious institutions must be protected. The burden to demonstrate whether these goals have been impaired rests on the one challenging the constitutionality of the program. These values underlie the concerns expressed both in the generative debates and conditions that led to the First Amendment, and the opinions of this Court struggling to apply those provisions.

The right to engage freely in religious activity and conduct is so important that any law "restrictive of religious practice, in this society, must advance interests of the highest order." *Church of Lukumi*, 113 S.Ct. at 2237 (internal quotation marks omitted) (quoting *Yoder*, 406 U.S. at 215). A state instrumentality cannot "require[] religious exercise," *Lee v. Weisman*, 505 U.S. 577, 594, 604 (1992). It also may not actually engage in it. *Abington Township*, 374 U.S. at 305 (Goldberg, J., concurring). Public schools are prohibited from "conveying or attempting to convey a message that religion or any particular religious belief is *favored* or *preferred*." *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. at 593 (emphasis in original). These all reflect different facets of the same idea - that personal religious freedom must be protected. They must be protected against the state's imposition of religion, coercion to participate in religious activities, state action to prefer or favor a religion, or, on the other hand, state action that would tend to impede or damage the exercise of religious beliefs, even when the state also has legitimate interests to be protected. *See, e.g., Yoder*, 406 U.S. at 214; *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

Personal religious freedom is not merely something tolerated because the government has no interest in it. To the contrary, this Court has held that the "Free Exercise Clause *commits government itself* to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from *animosity* to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Church of Lukumi*, 113 S.Ct. at 2234 (emphasis added). After all, it was "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." *Bowen v. Roy*, 476 U.S. 693, 703 (1986). Our Constitution itself affirmatively commits government to permit and protect religious practice and religious tolerance, and provides a high degree of protection for those practices.

At the same time, another of the purposes of the First Amendment was to protect the institutional autonomy of both civil and religious institutions. *See, e.g., Abington Township*, 374 U.S. at 222 (government neutrality toward religion prevents powerful sects from bringing about a fusion of governmental and religious functions, and also guarantees religious observance free of any compulsion from the state). In *Everson v. Board of Education*, 330 U.S. at 15, the Court quoted with approval a statement about the "interrelation of these complementary clauses" from the Court of Appeal of South Carolina rendered in 1843: "[t]he structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority." *Harmon v. Dreher*, 17 S.C. Eq. (Speers Eq.) 87, 120 (1843).

In *Lynch v. Donnelly*, Justice O'Connor identified the loss of political and institutional autonomy and the loss of personal religious liberty as the consequences of a regime where religion and government did not maintain their rightful roles and relations. 465 U.S. at 687-88. The loss of institutional autonomy was not feared by the Framers simply because of its consequences for personal religious liberty, but was "equally feared because of its tendencies to political tyranny and subversion of civil authority." *McGowan*, 366 U.S. at 430. For this reason, it has long been held that one of the principal

objectives of the Religion Clauses is to prevent, as far as possible, the intrusion of both religious and political institutions into each other's essential functions.[18]

This basic proposition operates in both conceptual directions. First, religion may not intrude into or take over the proper functions of government. *Kiryas Joel*, 114 S.Ct. at 2484 (state statute is "tantamount to an allocation of political power on a religious criterion and neither presupposes nor requires government impartiality toward religion . . .[and so] . . . violates the prohibition against establishment"); *Larkin v. Grendel's Den. Inc.*, 459 U.S. 116 (1982) (state statute gave religious groups a veto power over liquor license applications). By the same token, government and its agents cannot intrude into matters of religious belief, worship or governance. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, *supra*, (1987) (application of religious exemption to Title VII's prohibition against religious discrimination in employment to employment decisions of religious organization, does not violate the Establishment Clause); *NLRB v. Catholic Bishop of Chicago*, *supra*, (schools operated by church were not within the jurisdiction granted to NLRB by National Labor Relations Act); *Walz v. Tax Commission*, *supra*, (upholding tax exemptions for real property held by religious organizations for worship purposes). If neither form of intrusion by one institution into the other's proper area of operation or decision-making exists, or only a theoretical possibility of such an intrusion exists, then the Establishment Clause may not be violated. *Zobrest v. Catalina Foothills School District*, *supra*.

The interrelationship of both of these facets, personal religious freedom and protection of institutional autonomy, and the need to make sure that both of these interests are simultaneously balanced and protected, is a recurring theme in the Court's Religion Clauses cases. *See, Wisconsin v. Yoder*, *supra*; *Abington Township*

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[18] This condition, we submit, is a joining of free exercise and establishment clause concerns that cannot be remedied simply by jettisoning "excessive entanglement." *Supra*, note 6.

v. Schempp, supra; *Everson v. Board of Education, supra*. These themes are rooted in the history of the constitutional text and are applicable, as framed here, to a diverse array of problems. *Lemon* pays lip service to these concerns but its tripartite test of purpose, effect and entanglement has not proved capable of making the fine distinctions that complex constitutional litigation requires.

It is equally clear, however, that tinkering with the *Lemon* test itself will not solve the jurisprudential problem unless the Court also makes clear that the burden of proof must remain on the challenger of government aid programs, to demonstrate that the Establishment Clause has been violated. *See Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1871). In *Aguilar*, the Court viewed the burden as being on the schools and school board involved, to demonstrate that *no* publicly employed teacher could possibly *ever* convey a religious message in the course of providing Title I services. Indeed, in the absence of proof that this was impossible, the Court seemed to assume that it would occur, and so found that the remedial education program at issue there violated the Establishment Clause. *Aguilar*, 473 U.S. at 413-414. Justice Powell, concurring, found an Establishment Clause violation inherent in the mere "risk of government entanglement" in the program's administration. *Id.* at 415 (Powell, J., concurring). It has been said in other cases that a "state must be *certain*, given the Religion Clauses, that subsidized teachers do not inculcate religion." *Meek v. Pittenger*, 421 U.S. 349, 371 (1975) (emphasis added).

The failing of this attitude toward burdens of proof was sharply demonstrated by Justice O'Connor in her *Aguilar* dissent, noting pointedly the utter lack of evidence in the record of even a single instance of any problem. *Aguilar*, 473 U.S. at 424. Justice Scalia delivered an extensive criticism of this requirement for "up-front assurances" in his opinion in *Kiryas Joel*, 114 S.Ct. at 2513, *et seq.* (concurring). Public supervision alone, particularly of other public employees, should not automatically be assumed to create an Establishment Clause violation. The question should be what the evidence *actually demonstrates*, if anything, regarding attempts to teach religion in government programs.

This is so, first, because there is no principled reason that the burdens of proof in a Religion Clauses case should vary from those in any other civil litigation context. Second, it appears that when the Court has given consideration to this burdens-of-proof question, it recognizes this very problem. For example, in *Bowen v. Kendrick*, 487 U.S. at 622, rather than concluding or assuming that the Adolescent Family Life Act ("AFLA"), 42 U.S.C. § 300z *et seq.*, had the impermissible primary effect of establishing religion, the Court remanded the matter to the trial court to make a factual record and decide whether "*particular* AFLA grants *have had*" that effect. The need for "detailed factual findings" was emphasized by Justice O'Connor in her *Bowen* concurrence. *Id.* at 623. The need to resist the sort of assumptions upon which the 1985 *Aguilar* opinion rests was also emphasized by Justices Kennedy and Scalia, concurring in *Bowen*, 487 U.S. at 624, and in Justice Scalia's concurrence in *Kiryas Joel*, 114 S.Ct. at 2513, *et seq.* Until the Court makes clear that the burdens of proof rest on the challenger of the governmental program in question, as it should, *Lemon*'s failings will continue to bedevil the development of Religion Clauses jurisprudence.

III. *Aguilar* Must be Overturned.

This Court should insist that a challenger must demonstrate whether a *substantial* threat (either to personal religious freedom, or of interference by one institution with another) is presented in the case. If that threat were demonstrated to be both real and serious, then a violation of the Religion Clauses would be shown. The concern with actual and substantial threats, based on the facts, should be uncontroversial as that standard applies in every other context. Under the circumstances presented in this particular case, the analytical process suggested here leads to the conclusion that a public remedial program may constitutionally be provided in religious schools as was done before the 1985 *Aguilar* decision. That program does not demonstrably threaten religious freedom and institutional autonomy.

The Court should re-examine the record. There is still no

evidence of harm.[19] On the other hand, the social and financial costs and losses attendant upon *Aguilar*, outlined above, were set forth at the time in Justice Rehnquist's, O'Connor's and Burger's dissents in that case, *Aguilar*, 473 U.S. at 419-431. They need not be repeated here. Suffice it to say that the application of any arbitrary test that sacrifices "the long-range interests of the country," in Justice White's words, is profoundly unwise and should not be deemed required by our First Amendment. *Committee for Public Education v. Nyquist*, 413 U.S. 756, 820 (1973) (White, J., dissenting). Application of these concepts to the present case provides an inescapable affirmative answer to the question whether *Aguilar* should be overturned.

First, the provision of on-premises special education to students at all parochial schools, taught by the *same* teachers, with the same material, to reach the same goals, as used in public schools, is genuinely neutral as regards religion. No religious practice or concept is furthered thereby. As Justice O'Connor trenchantly observed in her opinion in *Kiryas Joel*, 114 S.Ct. at 2498 (emphasis in original):

> The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion. All handicapped children are entitled by law to government-funded special education. . . . If the government

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[19] "[A]bstract theories explaining why on-premises instruction might possibly advance religion dissolve in the face of experience in New York City." *Aguilar*, 473 U.S. at 424 (O'Connor, J., dissenting). In the same case Chief Justice Rehnquist criticized reliance on "gossamer abstractions" to overturn a useful, neutral program. *Id.* at 421. Such real threats are not to be found in cases of "attenuated financial benefit," or where violations of the Establishment Clause are found by exalting "form over substance," as the Court said in *Zobrest*, 113 S.Ct. at 2469. Where no real and substantial threat is demonstrated, no Religion Clauses violation is shown.

> provides this education on-site at public schools and at nonsectarian private schools, it is only fair that it provide it on-site at sectarian schools as well.

Second, because religion-neutral material is being taught, there simply *is* no real threat that either religious institutions or governmental institutions could intrude into the proper areas of activity of the other. Indeed, the fact that publicly-employed supervisors would be supervising the activities of publicly-employed special education teachers, on premises, demonstrates the independence of these two individual spheres. Clearly, on-premises special education presents no conceivable governmental threat to personal religious freedom. After 19 years of on-premises services, the lack of a single actual instance of any violation of Establishment Clause principles, as was recognized even in concurring opinions, *Aguilar*, 473 U.S. at 415, 421-31 (Powell, J., concurring; O'Connor, J., dissenting), shows that the risk in this case is chimerical at best.

Finally, the obligation of government to accommodate religious beliefs and practices should also weigh heavily in favor of overturning *Aguilar*. As noted above, this Court has repeatedly recognized this affirmative obligation. Since at least the 1920s, this Court has recognized that the right of parents to direct the education of their children is constitutionally protected. *Meyer v. Nebraska*, 262 U.S. 90 (1923); *Pierce v. Society of Sisters*, *supra*. And it is "'the best of our traditions' to 'accommodate[] the public service to the[] spiritual needs [of our people].'" *Zorach*, 343 U.S. at 314. As this Court has noted, protection of religious freedom predates "general acknowledgement of the need for universal formal education . . . . The values underlying [the Religion Clauses] have been zealously protected, sometimes at the expense of other interests of admittedly high social importance." *Yoder*, 406 U.S. at 214. It follows that even if the provision of on-premises special education in New York parochial schools could be viewed to benefit those children, Catholic, Jewish, Protestant and others alike, by permitting them to be helped in their own schools as public school students now are, that accommodation is entirely reasonable. In fact, it is required if the

parental rights noted above are to be respected in a neutral fashion, without impinging upon their childrens' rights to the services provided by Title I.

CONCLUSION

As Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) noted in *Kiryas Joel*, the 1985 opinion in *Aguilar* was in fact affirmatively "hostile to our national tradition of accommodation . . . [and] should be overruled at the earliest opportunity." *Kiryas Joel*, 114 S.Ct. at 2515. This is precisely that opportunity. *Aguilar* must be overturned in a way which genuinely reforms this Court's analytical methods.

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